

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’
MOTION IN LIMINE TO PRECLUDE TESTIMONY, DOCUMENTS,
AND OTHER INFORMATION REGARDING COMPLETENESS TESTING**

Defendants respectfully oppose Plaintiffs’ Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding Completeness Testing.¹ (Dkt. No. 3404) (filed Sept. 21, 2007) (“Plaintiffs’ Motion” or “Pl. Mot.”). In their motion, Plaintiffs seek an order barring Defendants from introducing any evidence regarding “completeness testing,” including the responding expert reports of Caren L. Dunne (“Dunne Report”) and Alan S. Newell (“Newell Report”).² Pl. Mot. at 2, 6. Plaintiffs’ rationale is their accusation that Defendants deliberately withheld information that Ms. Dunne and Mr. Newell considered in preparing their reports. *Id.* at 5-6. Their accusation is unfounded. The proper disclosures have been made, no documents

¹ In accordance with the Court’s directive, Defendants are filing this response on an expedited basis. *See* Tr. 70: 1-7 (May 14, 2007).

² Plaintiffs spend a lot of time in their motion asserting that completeness testing in the 2007 Plan is inadequate to perform an accounting. Plaintiffs’ Motion at 1-4. Defendants dispute that assertion and submit that the adequacy of such testing, and the 2007 Plan in general, are issues to be decided after the forthcoming hearing, not by a motion in limine seeking to exclude Defendants’ from presenting evidence related to the subject.

considered by Ms. Dunne or Mr. Newell are being withheld, and Plaintiffs' motion should be denied.

During the July 9, 2007 status conference, this Court recognized the potential problem of requiring massive amounts of disclosure in the context of expert reports:

The parties agree that as to expert witnesses Rule 26(a)(2) will be in effect, and they are to exchange Rule [26(a)(2)] disclosures for their expert witness together with data, documents or other information considered by the expert now. That last provision is a little unusual. I mean if there are experts who have considered all of the documents in the Commerce Department or all of the accounting treatises on record, they certainly do not have to produce that kind of information. But if there is specific reports or documents that are relevant to their testimony, then they have to be produced along with the 26(a)(2) disclosures.

Tr. 6:18-7:5 (July 9, 2007).

Consistent with the Court's direction and the requirements of Rule 26(a)(2), Ms. Dunne identified – and Defendants have produced – the materials that she specifically considered in preparing her responding expert report. Defendants have not produced the entirety of the materials compiled since 1996 by Ms. Dunne or her firm, Clifton Gunderson (formerly CD&L), nor did this Court require that they do so. Nor is there undisclosed completeness testing data that Ms. Dunne considered that was prepared by other firms.

Indeed, Plaintiffs fail to cite a single document referenced or considered by Ms. Dunne that they have not already been provided; instead, they assume, without any basis, that Ms. Dunne reviewed completeness testing data in preparing her report and considered it to form her opinion. Plaintiffs' assumption is incorrect. They misinterpret a statement in Ms. Dunne's report -- which merely summarizes the description of completeness testing articulated in the 2007 Plan -- to mean that she or her firm has been performing data completeness testing. See Pl.

Mot. at 6, quoting Dunne Report at 12 (“the 2007 Plan is ‘designed to begin with the land and identify any related revenue-producing instruments to support an expected payment’”). In fact, as her citation indicates, Ms. Dunne based her statement about completeness testing on the description of completeness testing set forth in the 2007 Plan and not some other source; indeed, when she makes the statement that Plaintiffs quote, she cites to the very page in the 2007 Plan that describes completeness testing. See Dunne Report at 12 (citing the 2007 Plan at 19). Contrary to Plaintiffs’ assumption, Ms. Dunne did not consider any other reports about completeness testing when she prepared her report.³

Similarly, Plaintiffs’ claims with respect to Mr. Newell’s report are meritless. In moving to exclude Mr. Newell’s report and potential testimony as evidence of “completeness testing,” Plaintiffs misapprehend the role of Mr. Newell and his firm. They assert that Mr. Newell and his staff actually performed “completeness testing,” Plaintiffs’ Motion at 6, when in fact, Mr. Newell’s report states that his firm “provided personnel and consulting support for the Litigation Support Accounting (LSA) and the ‘Land-to-Dollars Completeness Test.’ ” Newell Report at 2. Mr. Newell and members of his firm are historians and provide research and document support

³ Plaintiffs also cite to a memorandum that Ms. Dunne listed as an item considered for her report - a Memorandum dated March 31, 2007 from Susan Hinkins, NORC to Jeffrey Zippin, Office of Historical Trust Accounting (OHTA), Department of the Interior, regarding “Land to Dollar” completeness testing at the Horton Agency (Potawatomi Tribe), Bates No. D000-000-HTA-WDC-000038-001-001. See Plaintiffs’ Motion at 5 n.14. However, NORC prepared the memorandum and neither Ms. Dunne nor her firm was involved in data completeness testing at the Horton Agency, including the work mentioned in the memorandum. Ms. Dunne only reviewed this document in the process of preparing her responding report because Plaintiffs’ Expert, Don M. Pallais, considered it in preparing his report, see Pallais Report at 34; accordingly, Mr. Dunne listed it as one of the items considered for her report.

for completeness testing projects, but they do not perform completeness testing. Mr. Newell does reference a project that his firm supported as historians – the land-to-dollar prototype study at the Horton Agency, Newell report at 3 – to explain a principle he has observed as a professional historian, which is that a document lost in one collection may exist in another collection. However, he did not consider any particular documents about “completeness testing” to form his opinion as a historian.⁴

In sum, to the extent there are specific documents that Ms. Dunne and Mr. Newell considered for their expert opinions, they have already been provided to Plaintiffs. Accordingly, no basis exists to exclude their reports or to exclude evidence of completeness testing.

Dated: September 25, 2007

Respectfully submitted,
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⁴ The memorandum on the Horton Agency Land-to-Dollars prototype study was already provided to Plaintiffs in the AR. See AR, Memorandum of March 31, 2007 from Susan Dinkins, NORC, to Jeffery Zippin, Office of Historical Trust Accounting (OHTA), Department of the Interior, Bates No. D000-000-HTA-WDC-000038-001-001.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding Completeness Testing* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on *Plaintiffs' Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding Completeness Testing* [Dkt. No. 3404]. Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

United States District Judge

Date:_____